UNITED STATES
v.
VICTOR MATERIAL CO.

IBLA 80-902 Decided September 28, 1982

Appeal from that part of the decision of Administrative Law Judge Dean F. Ratzman dismissing contest complaint against one lode mining claim. CA-5271.

Affirmed.

1. Administrative Procedure: Administrative Law Judges -- Mining Claims: Contests -- Mining Claims: Hearings

   It is not reversible error for an Administrative Law Judge to supplement the record by receiving evidence after the close of the hearing in order to render a fully informed initial decision, where the party objecting to the admission of the additional evidence is given an opportunity to comment on and challenge such evidence.

2. Mining Claims: Discovery: Marketability

   Although a favorable showing of actual sales may demonstrate marketability, lack of sales is not necessarily conclusive on the issue of marketability. Lack of sales may be overcome, after all the evidence is heard, by a preponderance of the evidence showing that a prudent person could have extracted and marketed the mineral profitably.

APPEARANCES: John W. Burke III, Esq., Office of the Solicitor, San Francisco, California, for appellant; M. William Tilden, Esq., San Bernardino, California, for appellee.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

The Bureau of Land Management has appealed that part of the August 1, 1980, decision of Administrative Law Judge Dean F. Ratzman

dismissing the contest complaint against the Contact No. 2 lode mining claim. 1/ The Judge also declared certain lode claims and one millsite null and void. 2/ The claim in question is located in Death Valley National Monument. The subject lands were withdrawn from operation of the mining laws on September 28, 1976 (16 U.S.C. § 1901 (1976)).

The California State Office, Bureau of Land Management (BLM), instituted four separate contests against the claims on behalf of the National Park Service. The contests were consolidated and a hearing was held before Judge Ratzman on August 28, 1979, in Bakersfield, California.

The appeal to the Board is limited to the Contact No. 2 lode mining claim (Contest No. CA-5271). The material on this claim is wollastonite, a fibrous industrial mineral with various applications. The Judge concluded that contestee had preponderated over contestant's prima facie case of invalidity by presenting evidence of marketability in 1976 of the wollastonite from this claim (Decision at 13).

1/ On Mar. 9, 1981, the Board received a stipulation executed by the parties to the appeal. The parties indicate that there was some confusion and inconsistency in the record with reference to the two claims involved in CA 5271, Contact Nos. 1 and 2. The parties state that the two claims are physically located so that one claim is to the northwest of the other claim. They stipulate, however, that the Judge was not confused and the claim against which he dismissed the complaint was the "Northwest Claim."

2/ These claims were:

"Contest No. CA-5207

"Involving the Gold Belt Talc #1; Gold Belt Talc #2; Gold Belt Talc #3, all as amended, Lode Mining Claims; and Gold Belt Mill Site, formerly `Gold Belt Springs Mill Site' Mill Site Claim.

"Contest No. CA-5250

"Involving the White Horse Talc #1; White Horse #2; White Horse Talc #3; and White Horse Talc #4, formerly called White Horse No. 1 through No. 4 Lode Mining Claims.

"Contest No. CA-5269

"Involving the Spar No. 1 Lode Mining Claim.

"Contest No. CA-5271

"Involving the Contact No. 1 Lode Mining Claim.

"All situated in Inyo County, California."

The attorney who represented contestee at the hearing filed a notice of appeal as it related to these claims. However, he never filed a statement of reasons. He did file an answer to BLM's statement of reasons for its appeal. Subsequently, another law firm also filed an answer, indicating in a cover letter that the first answer had been erroneously filed and stating that "Victor Material Company has engaged the service of this law firm to act as Special Counsel in regards to all phases of this appeal." This law firm has not pursued the appeal filed by the first attorney. Therefore that appeal is dismissed. 43 CFR 4.402, 4.411. The Judge's decision as to these claims is final.

Appellant argues that the Judge relied on evidence erroneously admitted in reaching his conclusion as to the marketability of the wollastonite. In the alternative, appellant argues that the evidence relied on does not preponderate over its prima facie case of invalidity. We will treat each of appellant's arguments in turn.

The facts pertaining to appellant's allegation of erroneously admitted evidence are as follows. On December 21, 1979, appellee filed with the Judge a motion for submission of further evidence including "newly discovered evidence" pertaining to Pfizer Corporation's interest in appellee's wollastonite. Subsequently, appellee also filed requests to reopen the hearing. Having reviewed the documents sought by appellee to be added to the record, appellant on March 12, 1980, filed a motion in opposition, asserting that the new materials were hearsay, unreliable, and of questionable probative value. Appellant requested, however, that if the Judge were to accept appellee's submissions, the documents should be "assigned the requisite level of probative value" and received into the record without oral argument.

On March 17, 1980, Judge Ratzman ruled on appellee's motion to supplement the record. He received into evidence various documents from the files of appellee and Pfizer Corporation. In a May 27, 1980, order denying appellee's request to reopen the hearing the Judge indicated that he received these documents "in fairness to the mining claimant taking into account his testimony at Tr. 92-94. The Pfizer-Victor documents of 1975 and 1976 are the best evidence and in large part speak for themselves." 3/ The Judge declined to receive other data which was based on work prepared after the hearing containing conclusions of hindsight and speculation.

The decision refers to appellee's documents received after the hearing collectively as the Pfizer exhibit. This evidence is discussed on pages 7-9 of the decision. It shows essentially that Pfizer geologists found appellee's wollastonite acceptable, that Pfizer was ready to enter into a lease to obtain it, and that consummation was impeded by the pending withdrawal of the subject lands.

Appellant suggests that the evidence submitted after the close of the hearing lacked foundation, was unreliable, not probative, and not subject to cross-examination. Appellant argues that this evidence could be considered only to determine whether a new hearing should be granted.

[1] In conducting their proceedings administrative agencies have the duty to investigate all pertinent facts and to see that such facts are adduced when the parties themselves have failed to put them into the record. Isbrandtsen Co. v. United States, 96 F. Supp. 883, (S.D.N.Y. 1951), aff'd, 342 U.S. 950 (1952). Judge Ratzman's favorable ruling on contestee's motion for supplementation of the record in the

3/ At Tr. 92-94, appellee's president testified as to the interest of Southern Clay and Pfizer Corporation in the wollastonite from the claims.

case before us comports with these objectives and afforded him the opportunity of making an informed initial decision based on the pertinent factual data. In support of its position that the Judge's admission and use of this evidence constituted error, appellant has cited United States v. Rukke, 32 IBLA 155 (1977), and United States v. McKenzie, 20 IBLA 38 (1975). One of the principles reviewed in Rukke was that a factfinder, having admitted documentary evidence, may accord it the appropriate weight, as suggested by the circumstances. Appellant has not shown that Judge Ratzman, in the case before us, failed to properly apply this principle. The proposition for which appellant cites McKenzie is that evidence submitted on appeal after an initial decision in a mining contest may not be considered or relied upon in making a final decision but may only be considered to determine if there should be a further hearing. See also United States v. Gray, 50 IBLA 209 (1980); United States v. Mattox, 36 IBLA 171 (1978). These cases are distinguishable on the ground that they dealth with evidence submitted on appeal after an initial decision. In the case before us, the evidence was submitted to the trier of fact after the close of the hearing but prior to the initial decision. Appellant concedes the relevance of this evidence in its statement of reasons. 4/

Though appellant charges that it was denied the opportunity to cross-examine the sources of the information in the Pfizer exhibit, it submitted with its opposition papers a detailed 18-page declaration of Charles T. Weiler. This declaration quoted extensively from the Pfizer exhibit and contained numerous comments in rebuttal thereto. Portions of this declaration were admitted into evidence by Judge Ratzman's March 17, 1980, order. The fact that appellant's declaration left the Judge unconvinced does not demonstrate error or prejudice. In Cross-Sound Ferry Services, Inc. v. United States, 573 F.2d 725, 730 (2nd Cir. 1978), evidence received after the close of the record and subject to rebuttal by verified replies was held to have been properly admitted. In the face of charges that such action violated due process, the court found the agency's action to be neither arbitrary, capricious, nor an abuse of discretion.

Appellant's argument concerning lack of opportunity for cross-examination is unpersuasive for an additional reason. In the conclusion of appellant's submission opposing reopening the hearing, it argues that the motion to admit the Pfizer exhibit materials be denied; alternatively, however, it requests that if the motion is granted, "it be limited to the acceptance of the documentation into the record without oral argument and to assigning the documents the requisite level of probative value." (Emphasis added.) Appellant's alternative prayer was granted by Judge Ratzman. The consequences of this request in the alternative, therefore, must rest with appellant. See United States v. Shield, 17 IBLA 91 (1974).

4/ Appellant observes in its statement of reasons at page 5:

"Without a doubt, if the Judge had not considered appellee's post-hearing evidence, appellant's prima facie case preponderated over appellee's testimonial and documentary evidence * * *."

We conclude that the Judge did not err in receiving and utilizing evidence after the close of the hearing but prior to his initial decision. Arguments proffered by appellant are not persuasive that the opportunity to cross-examine would be productive of a changed result.

[2] Appellant argues that the impending withdrawal was of no consequence to Victor Material because Pfizer was unwilling to enter into a contract with appellee even in 1975. Appellant contends that appellee could not market its wollastonite in 1976, that at best there was only a speculative, hypothetical interest shown in its wollastonite. Further, appellant asserts that the Judge improperly weighed its expert testimony to the effect that appellee's wollastonite was not a competitive product. Alternatively, appellant requests a new hearing to present rebuttal testimony.

The testimony appellant cites in support of several of its contentions is that of Ralph Harris, appellee's president (Tr. 90-99). Harris testified as to his contacts with Southern Clay Company and with Pfizer concerning the wollastonite. He testified that both concerns thought his wollastonite was of good quality, that both were interested in it, but that no sales were finalized because of the impending withdrawal. (The Pfizer exhibit, supra, comprises the documentary evidence demonstrating Pfizer's interest in acquiring appellee's wollastonite.)

The transcript references cited by appellant do not support its arguments, and the evidence taken as a whole supports the Judge's conclusion that "[t]he sales were not made for reasons that were not related to the quality of the material, or possible difficulties with milling and processing" (Decision at 12). We conclude that the Judge's determination as to the Contact No. 2 lode mining claim is supported by such evidence as is required by the applicable authorities. In United States v. Gibbs, 13 IBLA 382 (1973), the Board took emphatic notice of the holding in Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972), cited by the Judge herein. In Gibbs the Board stated:

> It has repeatedly been held that proof of actual sales of minerals from the claims is not an indispensable element in establishing their marketability, and that while lack of development and sales may raise a presumption that the market value of the minerals found thereon was not sufficient to justify the cost of their extraction, this presumption may be overcome by evidence showing that the materials could have been extracted, removed and marketed at a profit [prior to the control date] * * * [Emphasis in original.]

Id. at 391. Appellant already had a stockpile of material at the Contact No. 2 claim; consequently, there could have been no lack of development. The documents relied on by the Judge show that the wollastonite could have been removed and marketed at a profit. In our view, the evidence received by the Judge after the hearing constituted "proper

evidence of what the claimant could have done with the deposit prior to the critical date" and was not speculative, hypothetical, or theoretical. See United States v. Osborne, 28 IBLA 13 (1976). It also demonstrates that there is no merit in appellant's contention that its expert evidence regarding the quality of the wollastonite was not properly evaluated by the Judge. Appellant has shown no reason to disturb the decision, and the request for a further hearing is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision to dismiss the contest of the Contact No. 2 claim is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

James L. Burski
Administrative Judge